

DIVISION 9. SMALL BUSINESS OPPORTUNITY PROGRAM¹

Sec. 2-1356. Short title.

This division shall be known as the "City of Atlanta's Small Business Opportunity Program."

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1357. Definitions.

The following words, terms and phrases, when used in this, division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Affiliates: OCC shall consider all affiliates of a business enterprise in determining whether the business enterprise qualifies for SBE status. In general, concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. The determination whether two or more business enterprises are affiliates shall follow the guidelines regarding affiliation as set forth in 13 C.F.R. § 121.103, as amended.

Atlanta Region shall mean the geographical area consisting of Barrow, Bartow, Carroll, Cherokee, Clayton, Cobb, Coweta, DeKalb, Douglas, Fayette, Forsyth, Fulton, Gwinnett, Henry, Newton, Paulding, Pickens, Rockdale, Spalding, and Walton counties.

Bid shall mean a quotation, proposal, sealed bid or offer to perform or provide labor, materials, supplies or services to the city for a price on an eligible project, or for an eligible project that generates revenue for the city.

Bidder shall mean any individual, sole proprietorship, partnership, joint venture, or corporation that submits a bid to the city.

City shall mean the City of Atlanta.

Commercially useful function: For the purpose of determining whether a business enterprise is performing a commercially useful function, upon a challenge to the SBE status pursuant to section 2-1365, OCC shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

- (1) A SBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.
- (2) To perform a commercially useful function, the SBE must be responsible, with respect to material and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself.

¹Editor's note(s)—Ord. No. 2021-55(21-O-0803) , § 2, adopted Nov. 8, 2021, amended the title of Div. 9 to read as herein set out. The former Div. 9 title pertained to small business enterprise opportunity program.

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- (3) A SBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of SBE participation.

Contractor shall mean a prime contractor or vendor on a city contract.

Control or controlled: For the purpose of determining whether the owner or owners of a potential SBE (as used in this definition, "SBE-owner", which shall denote one or more owners) controls the potential SBE, upon a challenge to the SBE status pursuant to section 2-1365, OCC shall consider all of the facts in the record, viewed as a whole, including without limitation the following:

- (1) For a SBE-owner to be deemed to control the potential SBE, the potential SBE must be independent. An independent business enterprise is a business whose viability does not depend on its relationship with another firm or firms.
 - (a) In determining whether a potential SBE is independent, OCC will scrutinize the SBE's relationships with other firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.
 - (b) OCC will consider whether present or recent employer/employee relationships between the SBE-owner and other firms or persons associated with other firms compromise the independence of the potential SBE.
 - (c) OCC will examine the potential SBE's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential SBE.
 - (d) In considering factors related to the independence of a potential SBE, OCC will consider the consistency of relationships between the potential SBE and other firms with normal industry practice.
- (2) A potential SBE must not be subject to any formal or informal restrictions which limit the customary discretion of the SBE-owner. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by persons other than the SBE-owner, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the SBE-owner, without the cooperation or vote of any other individual, from making any business decision of the business enterprise. This paragraph does not preclude a spousal co-signature on documents.
- (3) The SBE-owner must possess the power to direct or cause the direction of the management and policies of the business enterprise and to make day-to-day as well as long-term decisions on matters of management, policy and operations.
 - (a) A SBE-owner must hold the highest officer position in the company (e.g., chief executive officer or president).
 - (b) In a corporation, the SBE-owner must control the board of directors.
 - (c) In a partnership, the SBE-owner must serve as a general partner, with control over all partnership decisions.
- (4) Individuals who are not the SBE-owner may be involved in an SBE as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the business enterprise, or be disproportionately responsible for the operation of the business enterprise.

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- (5) The SBE-owner may delegate various areas of the management, policymaking, or daily operations of the business enterprise to other participants in the firm. Such delegations of authority must be revocable, and the SBE-owner must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the SBE-owner in the business enterprise's overall affairs must be such that OCC can reasonably conclude that the SBE-owner actually exercises control over the business enterprise's operations, management, and policy.
 - (6) The SBE-owner must have an overall understanding of, and managerial and technical competence and experience directly related to the type of business in which the business enterprise is engaged and the business enterprise's operations. The SBE-owner is not required to have experience or expertise in every critical area of the business enterprise's operations, or to have greater experience or expertise in a given field than managers or key employees. The SBE-owner must have the ability to intelligently and critically evaluate information presented by other participants in the business enterprise's activities and to use this information to make independent decisions concerning the business enterprise's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the business enterprise is insufficient to demonstrate control.
 - (7) If state or local law requires the owner of a particular type of firm to have a particular license or other credential, then the SBE-owner of that type of firm must possess the required license or credential in order to be deemed in control. If state or local law does not require an owner to have such a license or credential, OCC will not deny certification solely on the ground that the SBE-owner lacks the license or credential. However, OCC may take into account the absence of the license or credential as one factor in determining whether the SBE-owner actually controls the firm.
 - (8) OCC may consider differences in remuneration between the SBE-owner and other participants in the business enterprise in determining whether the SBE-owner controls the business enterprise.

Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the business enterprise's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the business enterprise. OCC may determine that a business enterprise is controlled by its SBE-owner although the SBE-owner's remuneration is lower than that of some other participants in the business enterprise. In a case where someone other than the SBE-owner formerly controlled the business enterprise, and the SBE-owner now controls it, OCC may consider a difference between the remuneration of the former and current owner of the business enterprise as a factor in determining who controls the business enterprise, particularly when the former owner remains involved with the business enterprise and continues to receive greater compensation than the current SBE-owner.

- (9) In order to be viewed as controlling a business enterprise, an SBE-owner cannot engage in outside employment or other business interests that conflict with the management of the business enterprise or prevent the SBE-owner from devoting sufficient time and attention to the affairs of the business enterprise to control its activities. For example, absentee ownership of a business and part-time work in a fulltime firm are not viewed as constituting control. However, an SBE-owner could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the SBE-owner controls the business enterprise when it is operating.
- (10) An SBE-owner may control a business enterprise even though one or more of the SBE-owner's immediate family members participate in the business enterprise as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, OCC must make a judgment about the control the SBE-owner exercises vis-a-vis other persons involved in the business enterprise as it does in other situations, without regard to whether or not the other persons are immediate family members. If OCC cannot determine that the SBE-owner—as distinct from the family as a whole—controls the business enterprise, then the SBE-owner has failed to carry her/his burden of proof

concerning control, even though s/he may participate significantly in the business enterprise's activities.

Day or days shall refer to calendar days.

Eligible project shall mean: Any city contract as described in section 2-1188 and section 2-1189 or as identified by the director of the office of contract compliance, excluding sole source procurement under section 2-1191, special procurement under section 2-1191.1, emergency procurement under section 2-1192, and contracts governed by 49 CFR Parts 23 and 26.

Joint venture shall mean an association of two or more persons, partnerships, corporations, or any combination of them, established to carry on a single business activity that is limited in scope and duration. The agreement establishing the joint venture, partnership or other multi-entity relationship shall be in writing. Further, participation in a joint venture shall be based on the sharing of real economic interest in the venture and shall include proportionate control over management, interest in capital acquired by the joint venture and interest in earnings.

Office of contract compliance (OCC) shall mean the Mayor's Office of Contract Compliance in the City of Atlanta.

Owner, owned, or ownership shall mean all owners of an applicant business must provide document proving status as a native-born citizen, naturalized citizen, or permanent resident of the United States. In determining whether a potential SBE is owned by a native-born citizen, naturalized citizen, or permanent resident of the United States, office of contract compliance will consider all of the facts in the record, viewed as a whole, including without limitation the following:

- (1) All securities which constitute ownership of an entity must be held directly by an individual or individuals.
- (2) Ownership shall be measured as though not subject to the property interest of a spouse if both spouses certify that only one spouse owns the business and if such assertion is supported by the totality of the evidence considered by the office of contract compliance.
- (3) OCC must find that the individual(s) ownership is real, substantial, and continuing, going beyond pro forma ownership of the business enterprise as reflected in ownership documents. The individual(s) must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

Small business enterprise (SBE) shall mean a firm located in the Atlanta Region which is an independent and continuing enterprise for profit, performing a commercially useful function, for which the gross revenues or number of employees, inclusive of any Affiliates as defined by 13 C.F.R. Sec. 121.103, does not exceed the size standards as defined pursuant to 13 C.F.R. § 121.201 (as further explained in 13 C.F.R. §§ 121.104 through 121.107), and which has: (1) filed a letter or other documentation from the United States Small Business Administration with OCC that establishes that the firm qualifies as an 8(a) firm or HUBZone firm with the United States Small Business Administration; (2) obtained certification as a disadvantaged business enterprise ("DBE") in the State of Georgia, including any agency or department of the State of Georgia, or the United States Department of Transportation; or (3) submitted evidence to OCC on a form to be prescribed by OCC affirming under penalty of perjury that the business does not exceed the size standards referenced in this definition.

SBE status shall mean whether a firm meets the qualification criteria of a small business enterprise, as set forth in this division.

Supplier shall mean a warehouse or manufacturer of materials, supplies or equipment which contracts directly with a bidder to provide such materials, supplies or equipment on an eligible project which involves a trade or service. For purposes of measuring the total contract dollars awarded or paid to suppliers on eligible

projects, only amounts paid to suppliers of goods customarily and ordinarily used based upon standard industry or trade practices shall be counted.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2015-63(15-O-1556), §§ 7—9, 12-16-15 ; Ord. No. 2021-55(21-O-0803) , §§ 3, 4, 11-8-21)

Sec. 2-1358. Statement of policy.

In conjunction with the City of Atlanta's Equal Business Opportunity Program, it is the purpose of this small business opportunity program to promote the economic welfare of the people of the City of Atlanta, to promote full and equal business opportunity for all persons doing business with the City of Atlanta, to promote commerce by assisting SBEs to actively participate in the city's procurement process, and to ensure the City of Atlanta utilizes programs that provide it with the best possible resources. In order to encourage competition, the foundation of the free enterprise system, the City of Atlanta's policy will ensure that a fair proportion of the total purchases and contracts or subcontracts for property, commodities, and services come from small businesses so long as the property, commodities and services of small businesses are competitive as to price and quality. The City of Atlanta has set a goal of 35 percent for the small business opportunity program. This is lower than the availability of SBEs in the marketplace.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2015-63(15-O-1556), § 10, 12-16-15)

Sec. 2-1359. Duties of the office of contract compliance.

Under this division, OCC shall have the following authority and duties for the implementation of the small business opportunity program under this division:

- (1) Administration and enforcement of this division.
- (2) Establishment of written procedures, informal guidelines, and forms as may be necessary to effectuate this division.
- (3) Monitoring compliance with the requirements of this division.
- (4) Certification of businesses as SBEs in accordance with the standards set forth in this division.
- (5) Development of a database of certified SBE's to be maintained as a public record of certified SBEs.
- (6) Investigation of alleged violations of this division, and the issuance of written statements following any determination of such investigation, stating the reasons therefore and any penalty to be imposed.
- (7) Collaborating with the various city departments to ensure maximum outreach to SBEs.
- (8) Determination of whether any of the penalties set forth in section [2-1373] should be applied to a business.
- (9) Attendance at pre-bid, pre-proposal, pre-construction and pre-work conferences.
- (10) Provision to business entities of all forms, applications, documents and papers necessary to comply with this division.
- (11) Provision of information to potential bidders, upon request by the potential bidder, which shall include names and contact information of certified SBEs, to reinforce and support outreach efforts by potential bidders.
- (12) Notification by certified mail that a bidder who has bid on and who otherwise would have been awarded a contract has the right to appeal a determination of noncompliance with this division, said

appeal to be determined by a contract compliance hearing officer, as provided in section [2-1367], within seven calendar days of receipt of the notice of noncompliance.

- (13) Notification by certified mail that a challenge has been made to an applicant's SBE status, said challenge to be determined by OCC.
- (14) Notification by certified mail that OCC has upheld a challenge to an applicant's SBE status and that the SBE status has been revoked, noting that the SBE has the right to appeal such determination, said appeal to be determined by a contract compliance hearing officer, as provided in section [2-1367] within seven calendar days of receipt of the notice of decertification.
- (15) Notification to the chief procurement officer of any determination of noncompliance with this division, and of any appeal from any such determination.
- (16) Monitoring, for data gathering and informational purposes, utilization of SBEs on eligible projects.
- (17) Maintenance of documents, forms, records or data regarding this program as provided in this division, including: (a) documents, forms, records or data regarding the dollar amounts subcontracted to or expended for services performed by subcontractors and suppliers on eligible projects, including the SBE status of each subcontractor and supplier; and (b) documents, forms, records or data regarding certified SBEs.
- (18) Development and implementation of outreach and assistance programs to promote equal contracting opportunities for all businesses that wish to do business with the city, regardless of SBE status.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2015-63(15-O-1556), § 11, 12-16-15)

Sec. 2-1360. Small business assistance.

The office of contract compliance may act as a resource for information on small business enterprises. The office of contract compliance may also undertake to raise the consciousness of SBEs about city business opportunities and provide information on taking advantage of the program benefits. Further, the office of contract compliance may provide the following assistance to small business enterprises:

- (1) *Access to training—Technical assistance.* The office of contract compliance may act as a resource for technical assistance. The office may collect, organize and disseminate information regarding available technical assistance providers in the Atlanta Market Area.
- (2) *Capital—Financing assistance.* The office of contract compliance may act as a resource for financial assistance. The office may collect, organize and disseminate information regarding available capital or financing sources; and may coordinate the development of programs with existing service providers in the Atlanta Region.
- (3) *Bonding assistance.* The office of contract compliance may provide SBEs with information regarding bonding including, providing a list of qualified service providers that supply bonding services; and may coordinate the development of programs with existing service providers in the Atlanta Region.
- (4) *Access to markets.* The office of contract compliance may work to facilitate access to markets for SBEs. The office of contract compliance may work with the Atlanta Development Authority and other development entities to connect eligible businesses to city, state and federal programs that promote investment and encourage employment, including but not limited to, the various hub zone, enterprise zone, and tax allocation districts. The office of contract compliance may monitor SBE involvement in procurement opportunities generated by the Atlanta Development Authority.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1361. City-maintained records and reports.

The effectiveness of this program will be measured by a review of data indicating prime, subcontractor and supplier awards to SBEs. Program effectiveness measurements will also include efforts by the City of Atlanta staff to provide prime contracting opportunities for SBEs. In order to ensure the effective tracking of these efforts, the following shall be done:

- (1) Each contractor shall continuously maintain, compile, and provide to the office of contract compliance, annual information relating to its use of SBEs on the city project. This information shall include without limitation the following information for each of the SBE subcontractors and suppliers utilized by the contractor on the city project: a description of the categories of contracts awarded to SBEs; the dollar value of contracts awarded to SBEs; and contact information for the SBEs. Additionally, the contractor shall provide information regarding its progress toward attaining the SBE goal on the city project.
- (2) Within 30 days after the end of a contract in which there was an SBE goal, each contractor shall provide the office of contract compliance with a report that summarizes the information provided pursuant to subsection 2-1361 (1) above, including without limitation: the identity of and contact information for each SBE to whom the contractor has awarded a subcontract or supplier agreement; the type of work performed or supplies provided by each subcontractor/supplier; the dollar value of each of the subcontracts/supplier agreements; and the total percentage of the value of the city contract subcontracted to SBE subcontractors and/or suppliers.
- (3) The office of contract compliance will submit annual SBE development reports to the council. These reports shall include an analysis of the total dollar value of city contracts/subcontracts awarded to SBEs during the preceding year, categorized by prime contracting dollars, subcontracting dollars, and supplier dollars. The percentage of the total dollar value of these contracts that was awarded to SBEs during the preceding year shall also be provided.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1362. Small business enterprise program goals and counting procedures.

- (a) The director of the office of contract compliance will set an SBE subcontracting goal of up to 35 percent for each specific prime contract with subcontracting and/or supplier possibilities subject to the small business enterprise program, but shall have the authority to reduce or eliminate such SBE goal on a contract-by-contract basis based upon the type of contract, the type of subcontracting work that will be required, and the availability of SBE's therefore. This goal is based on the statistical data cited in section 2-1358. Every bidder on an eligible project shall be required to submit, with its Bid submission, the names, address, certification numbers, if applicable, of certified SBEs or firms that have applied for SBE certification at the time of the bid submission, and any other information required by the office of contract compliance as set forth in the project's solicitation documents.
- (b) *Sheltered market.* The director of the office of contract compliance in consultation with the chief procurement officer will designate certain procurements as sheltered market procurement opportunities.
 - (1) *Contracts between \$20,000.00 and \$100,000.00.* Under the sheltered market program, any contract or purchase order for supplies, services and construction (except those contracts pertaining to municipal street systems as described by O.C.G.A. § 32-4-1 et seq. and purchases under subsection 2-1190(b) of the procurement code) made in accordance with the small purchase procedures of subsection 2-1190(a) of the procurement code shall, where practicable, include at least one SBE among the three businesses solicited to submit quotations. The director of the office of contract compliance and chief

procurement officer may agree to exclude any procurement in this category from the sheltered market at their joint discretion.

- (2) *Contracts between \$100,000.00 and \$25,000,000.00.* In addition, the director of the office of contract compliance and chief procurement officer may agree, with consultation and agreement with the commissioner of the user agency or his or her designee, to designate any contract between \$100,000.00 and \$25,000,000.00 for competition by and between SBEs only, except for those contracts pertaining to municipal street systems, as described in O.C.G.A. § 32-4-1 et seq., pertaining to public works construction as described in O.C.G.A. § 36-91-1 et seq. or other projects for which a sheltered market would conflict with state law. The sheltered market designation shall be made only when there is a reasonable expectation that bids will be obtained from at least three responsible SBEs and that the award will be made at a fair market price.
- (3) *Partial sheltered market procurements.* A sheltered market procurement of a single acquisition or a class of acquisitions may be total or partial. The director of the office of contract compliance and the chief procurement officer may designate a portion of an acquisition as a sheltered market procurement, except for construction.
- (4) To obtain a sheltered market procurement, an SBE must perform at least a given percentage of the contract. This provision limits the amount of subcontracting an SBE may enter into with other firms when performing these types of contracts. The provisions are as follow:
 - a. *Construction:* For general and heavy construction contractors, at least 15 percent of the cost of the contract, not including the cost of materials, must be performed by the SBE prime contractor with its own employees. For special trade construction, such as plumbing, electrical, or tile work, this requirement is 25 percent.
 - b. *Manufacturing:* At least 50 percent of the cost of manufacturing, not including the cost of materials, must be performed by the SBE prime contractor
 - c. *Services:* At least 50 percent of the contract cost for personnel must be performed by the SBE prime contractor's own employees.
- (5) Sheltered market bidders must be certified as such by the office of contract compliance by the bid due date.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2021-55(21-O-0803) , § 5, 11-8-21)

Sec. 2-1363. Certification as a small business enterprise.

- (a) In order to qualify as an SBE, a business must submit (1) a letter or other documentation from the United States Small Business Administration with OCC that establishes that the firm qualifies as an 8(a) firm or HUBZone firm with the United States Small Business Administration, or (2) a letter or other documentation from the State of Georgia or United States Department of Transportation with OCC that establishes that the firm qualifies as a DBE; or (3) evidence on a form prescribed by OCC, affirming under penalty of perjury that the business qualifies as an SBE as defined in section 2-1357. To the extent that any business qualified as an SBE under the self-certification procedure set forth in prior section 2-1363(a)(2), that business shall remain a certified SBE until the certification expires pursuant to section 2-1364, and thereafter shall be required to seek recertification under section 2-1364 in order to remain "certified".
- (b) The OCC has the right to audit the certification of any business providing a certification under subsection (a) in order to determine whether the business meets the criteria of a small business enterprise set forth in section 2-1357. If the OCC determines that a business submitted a false certification of its SBE status, the OCC may decertify the business by sending a notice of decertification, and the business may be subject to the

penalties set forth in section 2-1366. The SBE may appeal the initial notice of decertification within seven days of the receipt of the initial notice of decertification following the procedures set forth in section 2-1367.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2015-63(15-O-1556), § 12, 12-16-15)

Sec. 2-1364. Recertification.

Once certified as an SBE with OCC, the certification is valid for a period of five years from the date of certification. Prior to the expiration of the five-year period and pursuant to regulations issued by OCC, a business that desires to continue to qualify as an SBE must demonstrate its continued eligibility as an SBE under this Ordinance.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2015-63(15-O-1556), § 13, 12-16-15 ; Ord. No. 2021-55(21-O-0803) , § 6, 11-8-21)

Sec. 2-1365. Challenge to the status of a small business enterprise.

- (a) Any person, firm, or business can challenge the status of an SBE by filing a challenge on the prescribed form by the OCC with the OCC, subject to potential penalties set forth below.
- (b) Prior to taking formal action, the city staff shall provide the challenged SBE with written notice of the challenge. During the pendency of the proceeding, the SBE firm's certification shall remain valid. The office of contract compliance staff shall then investigate and prepare a recommendation regarding the challenged SBE status for review and approval by the director of the office of contract compliance. If approved by the director of the office of contract compliance, the office of contract compliance shall issue an initial notice of decertification to the SBE owner by certified mail. The SBE may appeal the initial notice of decertification within seven days of the receipt of the initial notice of decertification following the procedures set forth in section 2-1367. If the SBE owner fails to appeal the initial notice of decertification within the time period set forth in this section, or if the contract compliance hearing officer affirms the office of contract compliance's determination, the decertification shall be final and take effect immediately.
- (c) If the office of contract compliance decertifies an SBE proposed to work, or currently working on a contract, the decertified SBE's participation on the contract may no longer be counted toward fulfillment of the city's SBE goals. If the contractor no longer meets the city's SBE goals after the decertification of the former SBE, the contractor shall be required, within 30 days after notification by the office of contract compliance, to demonstrate good faith efforts to substitute the decertified SBE. Failure to demonstrate good faith efforts to substitute a decertified SBE will result in the bidder being declared non-responsive, if done prior to the award of the contract, or the contractor being held in default of the contract, if done after the award of the contract.
- (d) A protest to the status of an SBE will not cause any delays or otherwise affect any pending procurements or the ability of the city to award a particular contract.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1366. Penalties for false certification.

- (a) If the OCC determines that a business submitted a false certification of its SBE status, the OCC, in consultation with the chief procurement officer and the city attorney, shall consider suspension or debarment of the business pursuant to the provisions contained in division 16 herein.

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- (b) If a determination is made to suspend or debar the business, OCC shall provide a written notice of the suspension, which shall be sent by certified mail, return receipt requested, to the contractor. Such notice shall state that:
- (1) If there is a suspension, the period of the suspension.
 - (2) Bids or proposals will not be solicited from the suspended or debarred contractor, and, if they are received, they will not be considered during the period of suspension.
 - (3) Set forth with particularity the actions of the business that constitute the reasons for disqualification or debarment.
- (c) *Debarment.* The business shall be debarred pursuant to the provisions contained in division 16 herein if it is determined that the false certification was made knowingly, willfully or fraudulently.
- (d) If the OCC determines that a business submitted a false certification of its SBE status, the OCC, in consultation with the chief procurement officer and the city attorney, shall consider referring the matter to appropriate federal, state, or local authorities for consideration of possible criminal violations.
- (Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1367. Appeals.

- (a) *Determination of noncompliance.* A responsible bidder that is determined to be nonresponsive to the requirements of this division, and that otherwise would have been awarded a contract, as determined in consultation with the chief procurement officer, shall receive a written determination by the director of the office of contract compliance, via certified mail, setting forth the reasons for the determination of non-responsiveness.
- (b) *Denial of certification as an SBE.* Upon denying certification as an SBE, the director of the office of contract compliance shall notify the affected party in writing, via certified mail, setting forth the reasons for the denial of decertification.
- (c) *Decertification of an SBE.* Upon a decertification of an SBE, the office of contract compliance shall notify the affected party in writing, via certified mail, setting forth the reasons for the decertification.
- (d) *Time for filing notice of appeal.* Any business that has been denied certification as an SBE, or decertified as an SBE, or against whom a final determination of non-responsiveness to the requirements of this division has been made by the office of contract compliance officer, may appeal the final determination of non-responsiveness or decertification of SBE status or denial of SBE certification by filing a notice of appeal with the director of the office of contract compliance in writing within seven calendar days of receipt of the notice of the final determination of noncompliance or decertification.
- (e) *Posting of appeal security—Non-responsiveness.* Any bidder that files an appeal to a final determination of non-responsiveness by the office of contract compliance must, at the time of filing, post security in the amount of one percent of the financial offer of the appellant or, in the event the bid/proposal does not involve a fixed financial offer either in the form of payment of monies to the city or payment of monies to the bidder, \$100,000.00, to be tendered in the form of a bond or certified check. If the contract compliance hearing officer upholds the determination of the office of contract compliance, he or she shall assess against the appellant reasonable attorneys' fees and other administrative costs incurred by the city in reviewing and responding to the appeal. If the city is represented by its law department, such fees and costs will be calculated at the hourly rate of each attorney participating in the review and response to the appeal set forth in each attorney's most recent city paycheck times the number of hours worked by such participating attorneys on the appeal. If the city is represented by outside counsel, such fees and costs will be calculated at the billing rates of the firm's attorneys, plus all out of pocket costs of the firm concerning the appeal.

Within 15 days of ruling against the appellant, the contract compliance hearing officer, in consultation with the city's law department and outside counsel, if any, will calculate the city's cost in reviewing and responding to the appeal and will apply the appellant's bond or certified check to the costs. Any remaining balance of the bond or certified check will be returned to the appellant.

- (f) *Posting of appeal security—Denial of SBE certification.* Any applicant that files an appeal to a final determination of denial of certification by the office of contract compliance must, at the time of filing, post security in the amount of \$1,500.00 to be tendered in the form of a bond or certified check. If the contract compliance hearing officer upholds the determination of the office of contract compliance, he or she shall assess against the appellant reasonable attorneys' fees and other administrative costs incurred by the City in reviewing and responding to the appeal, up to \$1,500.00.
- (g) *Notice to contract compliance hearing officer.* Within three calendar days of receipt of a notice of appeal from an aggrieved party, excluding official holidays, the contract compliance officer shall forward the notice to the contract compliance hearing officer.
- (h) *Exhaustion of administrative remedies.* A protestor shall be required to exhaust its administrative remedies before filing suit in any state or federal court based on a determination of non-responsiveness or decertification of SBE status by the office of contract compliance rendered pursuant to the city's small business opportunity ordinance.
- (i) *Duties of contract compliance hearing officer.* The duties of the contract compliance hearing officer shall be as follows:
 - (1) The contract compliance hearing officer shall have exclusive jurisdiction to determine all appeals arising under this division.
 - (2) The contract compliance hearing officer shall set a hearing date not more than seven calendar days from the date of receipt of the notice of appeal from the director of the office of contract compliance, excluding official holidays. The hearing officer shall cause notice of the hearing to be served upon all parties by certified U.S. mail. Such notice shall set forth with particularity the decision being appealed by the aggrieved business and shall include the hearing date, time and place.
 - (3) At the hearing, all parties shall be provided a fair and impartial hearing and shall be allowed to produce any and all evidence in either party's possession concerning the final determination of non-responsiveness with the requirements of this division, or the decertification as an SBE.
- (j) *Decision.* Within seven calendar days after conclusion of the hearing, excluding official holidays, the contract compliance hearing officer shall make a written decision on the appeal, which decision shall affirm, alter or reverse the final determination of non-responsiveness or the decertification of SBE status by the office of contract compliance. The hearing officer shall decide whether the final determination of non-responsiveness or the decertification being appealed was in accordance with the law in existence at the time that the bidder was found to be non-responsive, at the time that the decertification was made, or at the time the penalties were imposed.
- (k) *Notice of decision.* Within seven calendar days after conclusion of the hearing, excluding official holidays, the contract compliance hearing officer shall issue written notice of the decision on the appeal to all parties. The notice of the decision shall be sent to all parties by certified U.S. mail and shall set forth the reasons for the decision.
- (l) *Appeal.* The decision of the hearing officer shall be binding on all parties, subject to the right of appeal as provided by O.C.G.A. § 5-4-1, et seq.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2021-55(21-O-0803), § 7, 11-8-21)

Sec. 2-1368. Small business enterprise directory.

The city will create an SBE directory that lists SBEs categorized by types of firms to facilitate identifying businesses with capabilities relevant to a particular specification. Each business listing will contain the business name, contact person, address, phone number, legal structure of the business, and details concerning the company's business specialties. North American Industrial Classification System (NAICS) Codes will be identified for each company. The office of contract compliance will continuously update and maintain the directory on the computer and on hard copy. In compiling this directory, the office of contract compliance will identify as many SBEs as possible that perform the types of work or provide the types of supplies needed by the city. The city will maintain and have available an updated SBE directory and source list(s) for each bid/proposal solicitation to facilitate identifying SBEs working in areas relevant to general contracting requirements and to particular solicitations.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1369. Procedures to ensure that SBEs have an equitable opportunity to compete for contracts and subcontracts.

- (a) *Procedures to ensure opportunities.* The City of Atlanta may utilize the following measures to ensure maximum practicable opportunities for SBE participation on city contracts:
- (1) Assist SBE in obtaining insurance and surety bonds where necessary in the performance of contracts, including but not limited to:
 - a. Packaging contracts so that dollar amounts do not require bonding;
 - b. Encouraging prime contractors to waive bonding or assist SBE subcontractors in obtaining bonding;
 - c. Encouraging staged bonding where feasible, when bonding is carried over from one project stage to the next; and
 - d. Relaxing bonding requirements for projects less than \$25,000.00;
 - (2) Encourage the formation of joint ventures between SBEs pursuant to section 2-1369.1. The office of contract compliance will also assist prime contractors in identifying interested SBEs for subcontracts;
 - (3) Provide information on the City of Atlanta's organization and contractual needs and offer instructions on bid specifications, procurement policy, procedures, and general bidding requirements;
 - (4) Provide specifications and requests for proposals to the SBE community in a timely manner to allow SBEs adequate time to develop responsible and responsive bids. In instances where the cost of obtaining specifications or requests for proposal is prohibitive, copies of the material will be made available at no charge to SBE development agencies;
 - (5) Establish prorated payment and delivery schedules where feasible, to minimize cash flow problems faced by small firms. The city will provide guidance to SBE contractors regarding maintenance of positive flow in order that current obligations can be met;
 - (6) Hold pre-bid conferences to explain SBE requirements as well as forms that must be submitted with a bid;
 - (7) Permit bidders to review and evaluate successful bid documents of similar procurements and use debriefing sessions to explain why certain bids were unsuccessful;

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- (8) Provide projected procurement information and contracting schedules through the office of contract compliance and other outreach efforts;
 - (9) Conduct internal information workshops to inform and acquaint the city staff with the goals and objectives of the City of Atlanta's Small Business Opportunity Program, and to sensitize them to the challenges faced by SBEs;
 - (10) Maintain records showing specific efforts to identify and award contracts to SBEs and establish a monitoring system to ensure that all contractors, subcontractors, consultants, and vendors comply with contract specifications related to SBE utilization; and
 - (11) Inform SBEs of bid notices and specifications related to their capability by placing bid notices in major local newspapers and other periodicals. Bid notices may also be sent to local trade associations, technical assistance agencies, economic development groups, and SBEs with capabilities that may be relevant to the bid notice as identified by the City of Atlanta's SBE data bank. Bid specifications may be made available to SBE contractor associations and technical assistance agencies. Lists of potential firms bidding as primes may also be made available to SBEs.
- (b) *Direct assistance to SBEs.* In addition to the procedures set forth in subsection 2-1369(a), the office of contract compliance may also undertake special measures to assist SBEs in overcoming barriers to participation on city contracts. This assistance will be offered directly by the city, as well as by city-referral to other assistance agencies with established, comprehensive, and continuous SBE development programs. Businesses providing management and technical assistance will be identified through a questionnaire, through personal experience with these businesses, and through requests for assistance. The office of contract compliance may offer the following direct assistance to SBEs:
- (1) Provide counseling and training sessions for SBEs. City staff will be available to interested business representatives to explain (in detail) instructions for preparation of bid specifications, the city's procurement policies, procedures and general bid requirements. The SBE program officer will coordinate and follow-up all requests for assistance to insure that all necessary information was provided.
 - (2) Provide coordination and referral to existing business development organizations.
 - (3) Sponsor intensive workshops and training sessions on identified SBE problem areas, i.e., pricing and estimating, joint venture formation, accounting principles, marketing, etc.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1369.1. Requirements for joint ventures.

- (a) Based upon the scope of work and market availability, and on whether bonding requirements would make it unreasonably burdensome for an SBE to bid on given project, the office of contract compliance shall determine on a project-by-project basis, in consultation with the commissioner of the user agency or his or her designee, whether good faith efforts to enter into a joint venture with an SBE shall be required for a given project. Only projects valued at \$5,000,000.00 or more are eligible for consideration under this section. On such projects in which good faith efforts to enter into a joint venture relationship with an SBE is required, no bid shall be accepted unless submitted by a joint venture, unless the office of contract compliance has determined that good faith efforts to enter into a joint venture have been demonstrated. The office of contract compliance shall determine whether good faith efforts to enter into a joint venture have been adequately demonstrated based on a review of relevant facts, documents and circumstances.
- (b) As to each joint venture under this section, a written joint venture agreement must be completed and executed by all parties to the joint venture, which clearly delineates the rights and responsibilities of each

member or partner, complies with any of the requirements of the mayor's office of contract compliance as set forth in the bid documents or otherwise, and provides that the joint venture shall continue for, at minimum, the duration of the project.

- (c) The office of contract compliance shall review and approve all contractual agreements regarding the terms and provisions of each joint venture relationship prior to the award of a contract, including agreements pertaining to:
- (1) The initial capital investment of each venture partner;
 - (2) The proportional allocation of profits and losses to each venture partner; no SBE venture partner's liability should ever exceed said partners percentage of revenue earned while a participant in the joint venture.
 - (3) The sharing of the right to control the ownership and management of the joint venture;
 - (4) Actual participation of the venture partners on the project;
 - (5) The method of and responsibility for accounting;
 - (6) The method by which disputes are resolved; and
 - (7) Any additional or further information required by the office of contract compliance as set forth in bid documents or otherwise.

Joint ventures may submit agreements for pre-approval no later than 14 calendar days prior to the date set for receipt of bids on a project. Otherwise, agreements must be submitted on or before the date set for receipt of bids on an eligible project. A bid submitted by a joint venture that does not include a satisfactory written joint venture agreement in accordance with the requirements of this section shall be deemed non-responsive and rejected.

- (d) The joint venture, and each member of the joint venture, shall provide the office of contract compliance access to review all records pertaining to joint venture agreements before and after the award of a contract in order to reasonably assess compliance with this subdivision.
- (e) For any project that also qualifies for implementation of the requirements set forth under section 2-1450, OCC is directed to utilize the requirements in section 2-1450 before utilizing the requirements in this section.
- (f) *Joint venture credit.* To receive joint venture credit, any certified SBE joint venture partner may not hold an ownership interest in the joint venture equal to or greater than 50 percent. The joint venture partner with less than 50 percent ownership interest may also receive subcontractor participation credit in the SBO joint venture contract opportunities.
- (g) *Penalties for noncompliance.* Any responsible bidder who fails to comply with this section shall be subject to any or all of the penalties contained in section 2-1373.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2020-61(20-O-1627), § 1, 11-11-20; Ord. No. 2021-55(21-O-0803), § 8, 11-8-21)

Sec. 2-1370. Methods by which the city will require contractors and subcontractors to comply with applicable SBE requirements.

The city's staff is available to assist contractors and subcontractors in implementing this program. As a standard procedure, such assistance includes:

- (1) Clearly setting forth the City of Atlanta's SBE goals in all the City of Atlanta solicitations;
- (2) Attending pre-proposal/bid conferences to explain the city's SBE program;

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- (3) Identifying SBEs in the City of Atlanta's database and providing a list of available SBEs upon request,
 - (4) Providing plan holder lists and pre-bid sign-in sheets made available to interested SBEs upon request.
 - (5) Remaining available to assist bidders in developing their SBE programs.
 - (6) Monitoring SBE participation levels on projects throughout the duration of a contract. Contractors violating contract provisions regarding SBE participation are subject to the sanctions set forth in section 2-1373 below.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1371. Procedures to require that participating SBEs are identified by name by competitors for contracts.

The city shall indicate, in solicitations for contracts that provide opportunities for SBE participation, goals for the use of SBE firms. Solicitations shall require all bidders to submit a written assurance of meeting the goals in their bids or proposals. Bids must also include a proposed schedule of SBE participation that lists the names of SBE subcontractors, a description of the work each is to perform, and the dollar value of each proposed SBE subcontract. If the SBE participation does not meet the SBE contract goals, the bidders must submit sufficient information and evidence demonstrating that the bidder made good faith efforts to meet the goals.

Bidders are required to submit this information with their bids and bidders are so informed at the time of solicitation. Agreements between a bidder and a SBE in which the SBE promises not to provide subcontracting quotations to other bidders shall be prohibited.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1372. Means to ensure that competitors make good faith efforts to meet SBE contract goals.

- (a) For all contracts for which SBE contract goals have been established, the bidder shall be required to submit SBE participation information to the City of Atlanta. The award of the contract will be conditioned upon satisfaction of the requirements established by the city. The bidder shall submit, with its bid submission, the following information:
 - (1) The name, address and certification number, if applicable, of the SBE firm(s) that will participate in the contract;
 - (2) The description of the work each named SBE will perform; and
 - (3) The dollar amount of participation by each named SBE firm.
- (b) If the SBE participation submitted by the bidder does not meet the SBE contract goals, the bidder must submit with its bid submission evidence demonstrating that "good faith efforts" were made to meet the goals. The city will review documents submitted at the time of bid, and make its determination of good faith efforts based on those submitted documents. Additional submissions will not be permitted. To demonstrate sufficient "good faith efforts" to meet the SBE contract goal, a bidder/proposer shall document the steps it has taken to obtain SBE participation. Such documentation may include evidence of the following:
 - (1) Attendance at a pre-bid meeting, if any, scheduled by the city to inform SBEs of subcontracting opportunities under a given solicitation;
 - (2) Advertisement in general circulation media, trade association publications, and other media for at least 15 days before bids or proposals are due;

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- (3) Written notification to SBEs that their interest in the contract is solicited;
 - (4) Efforts made to select portions of the work proposed to be performed by SBEs in order to increase the likelihood of achieving the stated goal;
 - (5) Good faith efforts to negotiate with SBEs for specific subcontracts, including without limitation:
 - a. The names, addresses, and telephone numbers of SBEs that were contacted;
 - b. A description of the information provided to SBEs regarding the plans and specifications for portions of the work to be performed;
 - c. A statement of why additional agreements with SBE were not reached;
 - d. Concerning each SBE, the SBE contacted but rejected as unqualified, and the reasons for the bidder's conclusion; and
 - e. Efforts made to assist the SBEs contacted that needed assistance in obtaining bonding or insurance required by the competitor or the city.
 - (c) To determine whether a competitor that has failed to meet SBE goals may be awarded the contract, the city will determine whether the efforts the bidder made to obtain SBE participation were "good faith efforts." Efforts that are merely pro forma are not "good faith efforts" to meet the goals. In order to award a contract to a bidder that has failed to meet SBE contract goals, the office of contract compliance will determine whether the bidder actively and aggressively made efforts to meet the city's SBE goals. A bidder making a good faith effort would consider a number of factors in negotiating with subcontractors, including SBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using SBEs is not in itself sufficient reason for a bidder's failure to meet the contract SBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from SBEs if the price difference is excessive or unreasonable. In determining whether a bidder has made good faith efforts, the office of contract compliance will take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, the office of contract compliance may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal but meets or exceeds the average SBE participation obtained by other bidders, the city may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts. Competitors that fail to meet SBE goals and fail to demonstrate "good faith efforts" shall be deemed non-responsive to the city's SBE requirements and shall not be eligible to be awarded the contract.
 - (d) To ensure that all obligations under contracts awarded to SBEs are met, the city shall review the contractor's SBE involvement efforts during the performance of the contract. The contractor shall bring to the attention of the city any situation in which regularly scheduled progress payments are not made to SBE subcontractors.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1373. Penalties for noncompliance.

A contractor who fails to comply with any portion of this division, and whose failure to comply continues for a period of 30 calendar days after the contractor receives written notice of such noncompliance from the director of the office [of] contract compliance, shall be subject to any or all of the following penalties:

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- (1) Withholding of ten percent of all future payments for the eligible project until the office of contract compliance determines that the contractor is in compliance with this division.
 - (2) Cancellation of the eligible project.
 - (3) Refusal of all future contracts or subcontracts with the city for a minimum of one year and a maximum of five years from the date upon which this penalty is imposed pursuant to the provisions contained in Division 16 herein.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1374. Outreach to SBEs.

The City of Atlanta considers information dissemination and communication with SBEs as an integral part of the city's SBE program. As a part of its outreach program, the office of contract compliance will solicit input from representatives of SBEs, trade associations and community organizations. This input will serve several important functions, including:

- (1) Providing information to identify additional SBE firms;
- (2) Assisting in refining SBE program goals and procedures; and
- (3) Providing an independent assessment of the effectiveness of the city's SBE program.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1375. Prime contracting guidelines.

- (a) As early in the acquisition planning process as practicable, but no later than 30 days before the issuance of a solicitation, a procuring agency must coordinate with OCC when a procurement is valued over \$5,000,000.00 in order to determine potential measures to be taken to maximize participation of SBEs in the procurement.
- (b) If OCC believes that a proposed procurement will render SBE prime contract participation unlikely, then OCC shall recommend to the procuring agency alternative procurement methods which would increase SBE prime contract participation. Such alternatives may include:
 - (1) breaking up the procurement into smaller discrete procurements;
 - (2) breaking out one or more discrete components; and
 - (3) reserving one or more awards for sub-contracting procedures as set forth in section 2-1369.
- (c) Where methods under subsection (b) are not feasible, OCC will work with the procuring agency to recommend a strategy that preserves SBE prime contract participation to the maximum extent practicable. OCC will also work to recommend that SBE participation is maximized through teaming arrangements and subcontracting opportunities as set forth in section 2-1369.
- (d) Nothing in this section shall be interpreted to mandate increased participation of SBEs where such increased participation would significantly affect the ability of a user agency to complete a given project.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1376. Severability.

If any provision of this division or any application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this article which can be given effect without the invalid provisions or applications, and are to this end declared to be severable.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09)

Sec. 2-1377. Sunset.

This subdivision shall sunset on December 31, 2026.

(Ord. No. 2009-78(09-O-1876), § 9, 12-15-09; Ord. No. 2013-44(13-O-1267), § 2, 9-25-13 ; Ord. No. 2014-15(14-O-1147), § 2, 3-26-14 ; Ord. No. 2014-37(14-O-1380), § 2, 8-27-14 ; Ord. No. 2015-01(14-O-1620), § 2, 1-14-15 ; Ord. No. 2015-30(15-O-1266), § 2, 6-24-15 ; Ord. No. 2015-63(15-O-1556), § 14, 12-16-15 ; Ord. No. 2020-68(20-O-1731) , § 1, 12-14-20; Ord. No. 2021-55(21-O-0803) , § 9, 11-8-21)

Secs. 2-1378—2-1380. Reserved.